Paper No. 21

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ANDRES RIVERA
and KEITH R. D'ALESSIO

Appeal No. 2002-1799
Application No. 09/353,592

HEARD: March 13, 2003

Before KIMLIN, KRATZ and POTEATE, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-30, which are all of the claims pending in this application.

outer container including an inner container there within. The inner container holds a polymerizable or cross-linkable material. A rate modifier, such as an initiator, accelerator or inhibitor for the polymerizable or cross-linkable material, is normally maintained separate from, or in non-contacting relationship with, the polymerizable or cross-linkable material in such an applicator. See, e.g. the paragraph bridging pages 9 and 10 of appellants' specification.

Appellants state that the "rejected claims stand or fall together" (brief, page 3, item No. V.). Consequently, we select claim 1 as the representative claim in deciding this appeal. See 37 CFR § 1.192(c)(7)(2000). Representative claim 1 is reproduced below.

> 1. An applicator for dispensing a polymerizable or cross-linkable material, comprising:
> an outer container;
> an inner container disposed within said outer container, said inner container containing a polymerizable or cross-linkable material; and
> a rate modifier for said polymerizable or cross-linkable material disposed on an outer surface of said inner container.

Claims 1-30 stand rejected under 35 U.S.C. § 103 as being unpatentable over Leung.

We refer to the briefs and to the answer for a complete exposition of the opposing viewpoints expressed by appellants and the examiner concerning the issues before us on this appeal.

OPINION

Having carefully considered each of appellants' arguments for patentability as set forth in the briefs, appellants have not persuaded us of reversible error on the part of the examiner. Accordingly, we will affirm the examiner's rejection as set forth in the answer. We add the following for emphasis.

The applicator of representative claim 1 requires that a rate modifier is disposed on an outer surface of the inner container while a polymerizable or cross-linkable material is located inside the inner container.

Appellants' acknowledge at page 5 of their brief that the applicator of figure 3 of Leung includes an outer container

applicator at a position other than being loaded in or on the applicator tip ... for example, in the device of FIG. 3, the initiator may be coated on the internal surface of body 200" (brief, page 5).

Based on Leung's teachings, the examiner has determined that it would have been obvious for one of ordinary skill in the art to coat the outer surface of the inner container (400) of Leung's Figure 3 embodiment with the rate modifier rather than the inner surface of the outer container (200) and as a result arrive at the subject matter of appellants' representative claim 1. As suggested by the examiner, one of ordinary skill in the art would have recognized from Leung's teachings that either of those locations would result in the modifier being available at essentially the same relative location of the applicator and in a location satisfying Leung's non-contact requirement. That alternative location of the rate modifier would have immediately commended itself to one of ordinary skill in the art as an alternative workable, non-contacting location for the modifier

Leung with rate modifier disposed at the claimed inner container outer surface location.

The examiner's position is bolstered by a review of the examples at column 12 of Leung, which are referred to by the examiner at page 8 of the answer. In this regard, the squeezing property of the flexible outer container coupled with the nearness thereof to the inner container outer surface so as to result in contact of those two surfaces for exerting a crushing force on the inner container as referred to in the examples results in the rate modifier being arranged next to or in contact with the outer surface of the inner container. In other words, the rate modifier would be "disposed on an outer surface of said inner container" as required by representative claim 1 even when coating the inner surface of the outer container therewith as expressly taught by Leung. Accordingly, one of ordinary skill in the art would have recognized that whether the rate modifier is initially coated on the inner surface of the outer container or the outer surface of the inner container, the resulting

coated" at column 10, lines 47-51 of the patent, we cannot agree with appellants that Leung would not have reasonably led one of ordinary skill in the art to "dispose" the rate modifier on the outer surface of the inner container based on the overall teachings of Leung.

In light of the above, appellants' arguments to the effect that one of ordinary skill in the art would not have been motivated to dispose the rate modifier (accelerator or initiator) on the outer surface of the inner container (400, FIG. 3) of Leung as one alternative is not found persuasive. Rather, we agree with the examiner that one of ordinary skill in the art would have been led to employ an inner container outside surface location for the rate modifier as an alternative to the outer container inside surface location mentioned by Leung (column 10, lines 43-53). In that regard, one of ordinary skill in the art would have readily recognized that there are only a limited number of possible places, including the outside surface of the inside container, for putting the rate modifier in the applicator

would have envisioned the selection of the outside surface of the inside container as one of those limited alternatives which were available as options for keeping the rate modifier separate from the polymerizable material in the Figure 3 applicator of Leung as required by Leung and with a reasonable expectation of success in so doing.

As a final point, we note that Leung is not limited to the preferred or exemplified embodiments disclosed therein as appellants would appear to argue. Rather, Leung may be relied upon for all that patent would have reasonably conveyed to one having ordinary skill in the art. See In re Beattie, 974 F.2d 1309, 1313, 24 USPQ2d 1040, 1043 (Fed. Cir. 1992); In re Young, 927 F.2d 588, 591, 18 USPQ2d 1089, 1091 (Fed. Cir. 1991); Merck & Co., Inc. v. Biocraft Laboratories, Inc., 874 F.2d 804, 807, 10 USPQ2d 1843, 1847 (Fed. Cir. 1989). Accordingly, for the reasons set forth above and in the answer, we shall sustain the examiner's rejection.

CONCLUSION

The decision of the examiner to reject claims 1-30 under 35 U.S.C. § 103 as being unpatentable over Leung is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 CFR § 1.136(a).

AFFIRMED

EDWARD C. KIMLIN Administrative Patent Judge	)
PETER F. KRATZ Administrative Patent Judge	) BOARD OF PATENT APPEALS AND INTERFERENCES
LINDA R. POTEATE Administrative Patent Judge	)

OLIFF & BERRIDGE, PLC
P.O. BOX 19928
ALEXANDRIA, VA 22320